No. 15,039

IN THE

United States Court of Appeals

For the Ninth Circuit

CARL C. LEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF JURISDICTION.

By an indictment filed in the United States District Court for the Northern District of California on September 14, 1955 (R. 3-4), appellant was charged in one count with a violation of Section 145(b) of the Internal Revenue Code (26 U.S.C., Section 145(b)) by filing a false and fraudulent income tax return on behalf of himself and his wife with the Collector of Internal Revenue at San Francisco, California, within the jurisdiction of that Court. The District Court had jurisdiction under 18 U.S.C., Section 3231, and Rule 18, Federal Rules of Criminal Procedure. Appellant was convicted and by final judgment filed on January 12, 1956, and entered on January 13, 1956,

was sentenced to imprisonment for five years and was fined $10,000.00 (R. 5-6). Notice of appeal to this Court was filed on January 12, 1956 (R. 8-10). The appeal was timely (Rule 37(a), Federal Rules of Criminal Procedure). This Court has jurisdiction to review the final judgment of the District Court (28 U.S.C., Sections 1291, 1294).

The clerk of the trial court taxed costs against appellant in the amount of $987.50 on January 17, 1956 (R. 10-11). On January 19, 1956, appellant filed an objection to an item of $434.40 included in the bill of costs (R. 12), and the trial court overruled appellant's objection and allowed the item on January 26, 1956 (R. 13-14). Notice of appeal to this Court was filed on February 3, 1956 (R. 14-15). The appeal was timely (Rule 37(a), Federal Rules of Criminal Procedure). This Court has jurisdiction to review the order of the District Court (28 U.S.C., Sections 1291, 1294).

STATEMENT OF THE CASE.

Appellant Carl C. Lee was indicted on September 14, 1955, in one count under Section 145(b) of the Internal Revenue Code (26 U.S.C., Section 145(b)) for attempting to evade and defeat a large part of the income tax due and owing by him and his wife for the year 1950. The indictment alleged that the offense was committed by means of filing a false and fraudulent return for the year 1950 in which it was stated that the net income of appellant and his wife

was $9,927.09 and that the tax owing thereon was $1,282.00, whereas their joint net income for that year was actually $69,162.69 upon which there was owing a tax of $27,564.42 (R. 3-4).

The trial commenced on December 5, 1955, and continued until December 14, 1955, when it was submitted to the jury. On that date the jury returned its verdict of guilty (R. 4).

As its final witness at the trial, the Government called Augustus V. Brady, a technical advisor to the regional counsel of the United States Treasury Department. Brady was qualified as an expert accountant (R. 71). In the course of his training, he testified, he had taken all of the correspondence courses offered by the Bureau of Internal Revenue, and he had studied accounting approximately six years either at night school or by correspondence, through cost accounting. He held a public accountant's license and had testified as an expert in approximately fifteen income tax cases in the federal courts in San Francisco and Nevada. He testified that he had been present in the court throughout the trial, had reviewed all of the documents admitted in evidence, and had read the reporter's daily transcript of the testimony each day during the trial (R. 72). Upon the basis of the testimony of other witnesses and documentary exhibits admitted in evidence, Brady had made certain computations, and on the basis of those computations he testified as follows:

(a) Appellant had gross receipts of $90,623.35 in 1950 (R. 75);

(b) Of that amount, appellant received $80,333.00 in cash and $10,293.35 by check (R. 75);

(c) The difference between appellant's gross receipts and the amount he reported on his return was $74,735.60 (R. 76);

(d) Appellant's net income was $84,662.69 (R. 78); and

(e) Appellant's tax liability, based upon that net income, was $36,938.80, whereas he had reported a tax liability of only $1,282.00 on his return (R. 78).

Although Brady admittedly had no personal knowledge of the matters as to which he was testifying, he was asked no hypothetical question stating the facts he was to assume as to any of the matters listed above until he was asked what amount of tax would be owing, assuming appellant had a net income of $84,662.69 and had correctly reported the amount of his deductions, exemptions, and credits.

Counsel objected to the questions asked of Brady on the grounds that the assumptions on which the questions were based had not been stated (R. 73, 77), that they called for hearsay testimony (R. 74, 75, 76), and that they called for opinion testimony (R. 78). All of these objections were overruled.

Brady's testimony was concluded at the close of the day on Friday, December 9, 1955, and the Court thereupon took an adjournment until the following Monday morning at 10:00 a.m. (R. 79). Promptly upon the resumption of the trial on Monday, Decem-

ber 12, 1955, counsel for appellant informed the Court that he had several matters to take up with the Court outside the presence of the jury (R. 79-80). Counsel then renewed a motion to dismiss the indictment, which was denied (R. 80), and made a motion for judgment of acquittal, which was likewise denied (R. 80). Counsel then moved to strike substantially all of Brady's testimony on the ground that it was hearsay and on the further ground that it was opinion testimony which was not prefaced by the proper type of hypothetical question. The motion was denied (R. 80-81).

Appellant requested the Court to instruct the jury that the intent necessary to warrant a conviction was the intent to defeat or evade the tax due, and that filing a false return with any other bad purpose, without a justifiable excuse, without ground for believing it to be lawful, or with a careless disregard for whether or not one had the right to do so would not constitute, in themselves, the intent required by law (Defendant's Requested Instruction No. 18, R. 7).

Appellant also requested the Court to instruct the jury that if it was not convinced that he was guilty of the felony with which he was charged, but was convinced that he had wilfully failed to pay his correct income tax for the year 1950, a misdemeanor, it might find him guilty of the lesser offense (Defendant's Requested Instruction No. 27, R. 8).

Both of these requested instructions were refused by the trial court, and proper exception was taken to such refusal pursuant to Rule 30 of the Federal Rules of Criminal Procedure.

On January 13, 1956, the Government filed its Bill of Costs, requesting the clerk of the trial court to tax costs against appellant in the total amount of $987.50 (R. 10-11). On January 17, 1956, the clerk taxed costs in that amount against appellant (R. 11). On January 19, 1956, appellant filed an objection to an item included in the Bill of Costs for payment of $434.40 to the Court reporter for a copy of the daily transcript ordered by the Government for its use during the trial (R. 12). On January 26, 1956, the trial court issued its order (R. 13-14) overruling appellant's objection and allowing the item in question (R. 13-14).

SPECIFICATION OF ERRORS.

1. The Court committed error in overruling appellant's objections to testimony of the witness Brady as to appellant's gross receipts and his net income, and in thereafter denying appellant's motion to strike such testimony (R. 73, 74, 75, 76, 77-78, 80-81). Such testimony was inadmissible as hearsay and as opinion testimony, not given in response to proper hypothetical questions.

2. The Court committed error in refusing to give the following instruction requested by appellant (R. 7):

"No. 18

There is only one state of mind that will supply the intent necessary to warrant a conviction in this case, and that is the intent to defeat or

evade the tax due. Filing a false return with any other bad purpose would not supply the necessary intent. Nor would filing a false return without a justifiable excuse, or without ground for believing it to be lawful, or with a careless disregard for whether or not one has the right so to do, constitute, in themselves, the intent which is required by the law. You may find the defendant guilty in this case only if you find that he knowingly filed a false return with the intention of evading or defeating the tax due."

Appellant duly excepted to the failure to give this instruction, stating as his ground that the type of conduct mentioned in that instruction should be excluded from the area of wilfulness or intent as it applied to the alleged offense (R. 101).

3. The Court committed error in refusing to give the following instruction requested by appellant (R. 8):

"No. 27

The defendant is charged with wilfully attempting to evade and defeat his income taxes and those of his wife for the calendar year 1950, an offense which is a felony. If you are not convinced that the defendant is guilty of this offense, but you are convinced beyond a reasonable doubt that he wilfully failed to pay his correct income tax for the year 1950, you may find him guilty of this lesser offense, which is a misdemeanor."

Appellant duly excepted to the failure to give this instruction, relying for his grounds upon Section 145(a) of the Internal Revenue Code of 1939, and

Rule 31(c) of the Federal Rules of Criminal Procedure (R. 101).

4. The Court committed error in overruling appellant's objection to an item of $434.40 paid to the Court reporter for a daily copy of the transcript ordered by the Government for its use during the trial (R. 12), which was taxed against appellant as an item of cost (R. 11).

SUMMARY OF ARGUMENT.

A. Augustus V. Brady, the Government's final witness, was qualified as an expert accountant and he proceeded to testify as to the amount and nature of appellant's gross receipts and net income in 1950. Although his testimony was based entirely upon the testimony of other witnesses and exhibits received in evidence, and he had no personal knowledge of the matters as to which he testified, the questions asked of him by the Assistant United States Attorney were not presented hypothetically and the assumptions which he was to make were not stated to him.

Brady testified that in 1950 appellant had received $80,333.00 in cash and $10,293.35 by checks; that his total receipts were $90,623.35; that his business income was $85,662.69; and that his net income was $84,662.69;—all without having been asked a single hypothetical question.

Appellant's objections to this testimony on the grounds that it was hearsay and opinion testimony

were overruled. At the conclusion of Brady's testimony, appellant moved to strike on the same grounds, and the motion was denied.

As a result of the Government's failure to put its questions to Brady in hypothetical form, it is likely that his testimony carried more weight than it was entitled to and acquired far greater authenticity than if he had testified in response to proper hypothetical questions.

The rule is well settled that when an expert witness testifies upon the basis of the testimony of other witnesses and other evidence presented at the trial, his testimony should be given in response to hypothetical questions.

B. The Court should have given an instruction requested by appellant, based upon *Bloch v. United States* (CA 9, 1955) 221 F.2d 786, rehearing denied June 14, 1955, 223 F.2d 297, to the effect that the intent necessary to warrant conviction was the intent to defeat or evade the tax due, and could not be supplied by any other bad purpose.

C. Rule 31(c), Federal Rules of Criminal Procedure, provides that a defendant may be found guilty of an offense necessarily included in the offense charged. To be necessarily included in a greater offense, a lesser offense must be such that it is impossible to commit the greater without first having committed the lesser.

When this test is applied, it is apparent that the misdemeanor of wilfully failing to pay tax, which

is prohibited by Section 145(a) of the Internal Revenue Code of 1939, is necessarily included in the felony of wilfully attempting to evade or defeat tax, which is proscribed by Section 145(b). The misdemeanor consists of two elements: (1) a failure to pay the full amount of tax owing, and (2) wilfulness. The felony includes both of these elements plus an additional element not necessary to the misdemeanor, viz., some affirmative act of wilful commission. Since it is thus impossible to commit the felony without committing the misdemeanor, the lesser offense is included in the greater.

This was clearly recognized by the Supreme Court in *Spies v. United States* (1943) 317 U.S. 492, 63 S.Ct. 364, and it was recognized by the trial court in this case in its charge to the jury on the elements of the offense charged.

It follows that the Court should have instructed the jury, as requested by appellant, that if it was not convinced that the defendant was guilty of the felony, but was convinced that he had wilfully failed to pay his correct income tax, it might find him guilty of the lesser offense, a misdemeanor.

The case of *Berra v. United States* (CA 8, 1955) 221 F.2d 590, cert. granted December 5, 1955, ... U.S. ....., 76 S.Ct. 190, involves a similar, although not identical, question as to whether a defendant charged with the felony under Section 145(b) was entitled to an instruction that the jury might find him guilty of a misdemeanor under Section 3616(a) of the Internal Revenue Code of 1939.

Appellant's rights were substantially prejudiced by the Court's refusal to give the instruction requested, since the term of imprisonment to which he was sentenced was greater than that which could have been imposed upon conviction of the misdemeanor under Section 145(a).

D. The rule is well established that the cost of a copy of the reporter's transcript purchased for the exclusive use and convenience of the plaintiff is not taxable, although the cost of a copy used by the Court is allowable. Since the daily transcript ordered by the Government in this case was for the exclusive use and convenience of Government counsel during the trial, and there is no indication that it was even seen by the judge, the cost of this transcript is not taxable to appellant under 28 U.S.C.A., Section 1920(2).

ARGUMENT.

A. THE TESTIMONY OF THE WITNESS BRADY AS TO APPELLANT'S GROSS RECEIPTS AND NET INCOME WAS INADMISSIBLE, AND THE COURT'S ACTION IN OVERRULING APPELLANT'S OBJECTIONS AND IN DENYING APPELLANT'S MOTION TO STRIKE SUCH TESTIMONY SUBSTANTIALLY PREJUDICED APPELLANT'S RIGHTS.

Augustus V. Brady was the final witness called by the Government. He was a technical advisor to the regional counsel's office of the United States Treasury Department. He testified that his education included all of the correspondence course offered by the Bureau of Internal Revenue in the subject of

accounting, including cost accounting. He had studied accounting for approximately six years, either at night school or by correspondence; he was licensed as a public accountant; and he had testified as an expert witness for the Government in more than fifteen cases over a period of seven years in the Federal Courts in San Francisco and Nevada (R. 71-72).

He had been present throughout the trial and had examined all of the exhibits admitted in evidence. On the basis of the testimony and exhibits, he had computed the net income of appellant for the year 1950 (R. 72).

Brady was then asked a series of questions as to appellant's gross receipts and net income in 1950 which he was permitted to answer over appellant's objection. Although Brady admittedly had no personal knowledge of the matters as to which he was testifying and his testimony was based entirely upon the testimony of other witnesses and other evidence in the case, the questions asked of him by the Assistant United States Attorney were not presented hypothetically and the assumptions which Brady was to make were not stated to him.

Brady was never asked a question in proper hypothetical form throughout his entire examination, until, at the conclusion of his examination, he was asked the amount of tax owing by appellant for 1950, assuming a specified net income and assuming deductions, exemptions, and credits as shown on his tax return.

Brady testified that appellant had received cash receipts of $80,333.00, that he had received $10,293.35 by checks, and that his total receipts were $90,623.35 (R. 75). He testified that appellant's business income was $85,662.69, and that his net income was $84,662.69 (R. 78). And then, in response to the only hypothetical question asked of him, he testified that appellant's total tax liability would be $36,938.80.

Appellant made frequent objections throughout the course of this testimony, as follows:

> "Q. (By Mr. Lockley). Have you made a computation then of the receipts, total receipts from the business or profession received by Dr. Lee during the year 1950?
>
> Mr. Johnston. I will object to it if the Court please as that calls for hearsay testimony. The man has no knowledge of the receipts that Dr. Lee had in 1950.
>
> Mr. Lockley. I am merely asking him a preliminary question which may be answered yes or no.
>
> The Witness. Yes I have."
>
> (R. 74).

* * * * * * *

> "Q. And can you give me a breakdown of the manner in which you arrived at the total figure of gross receipts from business or profession for the year 1950?
>
> A. Yes, I can.
>
> Q. Will you give them to me briefly?
>
> A. I have a total cash receipts of $80,000.
>
> Mr. Johnston. I am going to object, your Honor that this again is hearsay testimony. I

have no question about Mr. Brady's qualifications and I assume that all he has done is total up a list of figures here and it is purely a mathematical computation, why, I have no objection to stating the total.

The Court. I assume it purports to be a summary or summation?

The Witness. Yes, Sir.

The Court. Very well, I will allow it.

Q. (By Mr. Lockley). What is the total figure of cash receipts?

A. I have $80,333 and no cents.

The Court. Three hundred thirty-three? Three hundred thirty, three hundred thirty?

A. Yes. Amounts received by checks $10,-293.35, making a total receipts from 11 patients of $90,623.35."

(R. 74-75).

* * * * * * *

"Q. Now what did you allow in the nature of deduction, credits, and exemptions against that figure?

A. Well, the cost of goods sold as shown on the income tax return is $2,003.31. That I did not disturb.

Q. There was also other business deductions of $2,957.35?

Mr. Johnston. If the Court please, may it be understood that our objection based on hearsay goes to this entire line of testimony. The objection that we make is based on the theory that these figures, once that they are stated authoritatively as if they were stated as a fact are stated as an independent exhibit in existence, which I think is unfair.

The Court. All of this testimony as I gather it and view it is predicated upon either testimony offered in this court or written records including the return of the credit, is that correct?

The Witness. Yes, your Honor.

Mr. Lockley. I have no objection if your Honor cares to do so to give the jury the instruction at this time concerning the weight to be given to the testimony of an expert.

Mr. Johnston. If the Court please, this testimony is purely hypothetical and there has not been a single hypothetical question asked or a single assumption stated as such.

The Court. Thus far the testimony has been predicated upon the record, hasn't it?

Mr. Lockley. That is correct.

The Court. From the Government's theory?

Mr. Lockley. That is correct.

The Court. The objection is overruled."

(R. 76-77).

* * * * * * *

"Q. And what is the net income figure that you arrived at from this fact?

Mr. Johnston. If the Court please, I will try not to interrupt again but may the record also show that our objection is based upon the ground that this is opinion testimony?

The Court. Overruled."

(R. 77-78).

Brady's testimony was concluded at the close of the day on Friday, December 9, 1955. On the following Monday morning, appellant moved to strike substantially all of Brady's testimony on the ground that it was hearsay and on the further ground that it was

opinion testimony which was not prefaced by proper hypothetical questions (R. 80). The motion was denied (R. 81).

Brady was qualified as an expert, and his qualifications were impressive. His testimony could reasonably have been expected to carry great weight with the jury. While it is true that he explained that his computations were based upon the testimony of other witnesses, still the precise questions asked of him were, in many instances, stated without reference to that fact and without the statement of facts which Brady was intended to assume, and Brady's answers to such questions were in the form of flat statements of fact. It is likely, because of this, that Brady's testimony carried more weight with the jury than it was entitled to and that the figures, which he stated so positively, acquired, in the minds of the jurors, an authenticity far greater than they would have had if they had been given in response to proper hypothetical questions.

The rule is well settled that when an expert witness testifies not upon matters which are within his own knowledge but upon the basis of the testimony of other witnesses and other evidence which has been presented at the trial, his testimony should be based upon hypothetical questions stating all of the facts which he is asked to assume before expressing his opinion. Wigmore states the rule thus:

> "Thirdly, though hypothetical presentation is thus not universally necessary, it is certainly necessary (for the reason just noted) where the

premises are not supplied by the witness himself. The premises must be brought out in some way. If the witness cannot himself supply them by details of his own observation, they must be presented hypothetically."

2 Wigmore on Evidence (3rd ed., 1940), Section 676, p. 797.

This rule is adhered to in the Federal Courts.

"It is well settled that, in the examination of experts as to matters which they have not themselves observed, testimony as to their opinions should be predicated upon hypothetical statements propounded in proper questions, not upon the testimony of other witnesses whom they have heard testify."

Dunnagan v. Appalachian Power Co., 33 F.2d 876, 878, cert. den. 50 S.Ct. 152, 280 U.S. 606.

"The rule is, as laid down in Greenleaf's Evidence, 'If the facts are doubtful and remain to be found by the jury, it has been held improper to ask an expert who has heard the evidence what is his opinion upon the case on trial; though he may be asked his opinion upon a similar case hypothetically stated.' "

Dexter v. Hall (1872) 15 Wall. 9, 26.

B. THE COURT FAILED TO INSTRUCT THE JURY PROPERLY ON THE QUESTION OF INTENT.

The Court refused to give the following instruction requested by appellant (R. 7):

"No. 18

> There is only one state of mind that will supply the intent necessary to warrant a conviction in this case, and that is the intent to defeat or evade the tax due. Filing a false return with any other bad purpose would not supply the necessary intent. Nor would filing a false return without a justifiable excuse, or without ground for believing it to be lawful, or with a careless disregard for whether or not one has the right so to do, constitute, in themselves, the intent which is required by the law. You may find the defendant guilty in this case only if you find that he knowingly filed a false return with the intention of evading or defeating the tax due."

This requested instruction was based squarely on this Court's decision in *Bloch v. United States* (CA 9, 1955) 221 F.2d 786, rehearing denied June 14, 1955, 223 F.2d 297. In that case, this Court reversed a conviction under Section 145(b), in part because the trial court had given an instruction to the effect that wilfulness includes doing an act without justifiable excuse, without ground for believing that the act is lawful, or with a careless disregard for whether or not one has the right so to act. This Court said:

> "In this Section 145(b) tax evasion case there is only one state of mind that will supply the intent necessary to sustain a conviction, and that is the intent to defeat or evade the payment of the tax due. Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the payment of the income tax that is due. Nor would

filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do constitute in themselves the intent which is required under the section."

The trial court should have given the instruction requested, and its failure to do so substantially prejudiced appellant's rights.

C. THE COURT SHOULD HAVE GIVEN THE INSTRUCTION REQUESTED BY APPELLANT ON LESSER INCLUDED OFFENSE.

1. The felony with which appellant was charged necessarily includes the misdemeanor of wilful failure to pay tax.

Appellant requested an instruction, which the Court refused to give, that the jury might find appellant guilty of the misdemeanor of wilfully failing to pay his correct income tax, if the jury was not convinced that he was guilty of the felony with which he was charged.

Appellant was indicted under Section 145(b) of the Internal Revenue Code of 1939, the pertinent provisions of which are:

". . . any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter . . . shall . . . be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 145(a) of the Code provides, in part:

> "Any person required under this chapter to pay any . . . tax . . . who wilfully fails to pay such . . . tax . . . shall . . . be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

The instruction requested was as follows (R. 8):

> "The defendant is charged with wilfully attempting to evade and defeat his income taxes and those of his wife for the calendar year 1950, an offense which is a felony. If you are not convinced that the defendant is guilty of this offense, but you are convinced beyond a reasonable doubt that he wilfully failed to pay his correct income tax for the year 1950, you may find him guilty of this lesser offense, which is a misdemeanor."

Appellant was entitled to this instruction under Rule 31(c), Federal Rules of Criminal Procedure, which provides:

> "*Conviction of Lesser Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."[1]

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[1]Rule 31(c) is a restatement of Title 18 U.S.C., former Sec. 565, which provided:

> "In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense."

This Court has approved the following definition of a necessarily included offense:

> "To be necessarily included in the greater offense the lesser offense must be such that it is impossible to commit the greater without first having committed the lesser."
>
> *Giles v. United States* (CCA 9, 1944) 144 F.2d 860, 861 (holding the offense of intentionally pointing and discharging a firearm is not necessarily included in negligent homicide);
>
> *Barbeau v. United States* (CA 9, 1952) 193 F.2d 945, cert. den. 343 U.S. 968, 72 S.Ct. 1064 (holding the offense of negligent homicide is included in murder).

The rule approved in the *Giles* case was recently quoted with approval by the United States Court of Appeals for the Eighth Circuit in *Bianchi v. United States* (CA 8, 1955) 219 F.2d 182.

The question presented, then, is whether it is possible to commit the felony of wilfully attempting to evade or defeat income tax, under Section 145(b), without first having committed the misdemeanor of wilfully failing to pay income tax, under Section 145(a). It is clear that this is not possible.

If a taxpayer pays his correct tax in full when it is due, he cannot possibly be guilty of the felony of attempted tax evasion, since one of the elements of the felony offense is a failure to pay the full amount of tax owing.

> ". . . it is settled judicially that in the absence of proof that the defendant owed more tax than

he paid, he could not be convicted under Sec. 145(b); . . ."

Balter, *Fraud Under Federal Tax Law* (2nd ed., 1953), p. 349.

"To establish its case the government must prove not only an attempt wilfully to defraud it but also that a tax in addition to what the taxpayer had already paid remains due and owing."

United States v. Schenck (CCA 2, 1942) 126 F.2d 702, 704.

"Undoubtedly the burden was upon the government to prove that an income tax was due from Mr. Gleckman for the years in question over and above the amount returned—he could not be guilty of attempting to evade or defeat a tax unless some tax was due. *O'Brien v. United States,* 51 Fed. (2d) 1939."

Gleckman v. United States (CCA 8, 1935) 80 F.2d 394, 399.

If a taxpayer fails to pay his correct tax, but his failure is unintentional or due to honest mistake, he cannot be guilty of either the misdemeanor or the felony, since wilfulness is an element of both offenses. However, if the failure to pay is wilful, the misdemeanor is made out; and when there is added to this wilful omission some affirmative act of wilful commission, the felony has been committed.

In other words, the felony includes the two elements constituting the misdemeanor, plus an additional element not necessary to the misdemeanor. It

is thus impossible to commit the felony without first having committed the misdemeanor.

This has been recognized by the Supreme Court in a leading case:

Spies v. United States (1943) 317 U.S. 492, 63 S.Ct. 364.

In *Spies* the defendant had been charged with a felony under Section 145(b) in an indictment which recited wilful failure to file a return and wilful failure to pay the tax as the means by which the felony was committed. The trial court refused to give an instruction requested by the defendant to the effect that to be guilty of the felony required some affirmative act in addition to the misdemeanors of wilful failure to file and wilful failure to pay. The Supreme Court reversed the conviction, holding that the defendant was entitled to such an instruction.

In the course of its opinion the Supreme Court discussed at length the relationship between Section 145(a) and 145(b), and particularly between a wilful failure to pay tax and a wilful attempt to evade or defeat tax. The Court said:

> "A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. *We think it clear that this felony may include one or several of the other offenses against the revenue laws.* But it would be unusual and we would not readily assume that Congress by the felony defined in Section 145(b) meant no more than the same derelictions it had just defined in Section 145(a)

as a misdemeanor. Such an interpretation becomes even more difficult to accept when we consider this felony as the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.

"The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States v. Murdock,* 290 U.S. 389 [3 USTC Par. 1194]. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax where there had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.

"Had Section 145(a) not included willful failure to pay a tax, it would have defined as misde-

meanors generally a failure to observe statutory duties to make timely returns, keep records, or supply information—duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be a permissible and perhaps an appropriate construction of Section 145(b) that it made felonies of the same willful omissions when there was the added element of duty to pay a tax. The definition of such non-payment as a misdemeanor we think argues strongly against such an interpretation.

"The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common law 'attempt.' The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. *We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the*

lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony." (Italics added).

317 U.S. at pp. 497-499, 63 S.Ct. at pp. 367-368.

Here is clear recognition that the felony includes the misdemeanor of wilful failure to pay.

The trial court in this case likewise recognized this principle when it correctly instructed the jury (R. 91):

"To establish its case, the government must prove beyond a reasonable doubt both of the following two elements:

"1. That substantial income tax was due and owing from the defendant in addition to that declared in his income tax return; and,

"Second, that the defendant wilfully attempted to evade and defeat such tax."

The Supreme Court has very recently held that a defendant charged with a felony under Section 145(b) was not entitled to an instruction that the jury might find him guilty of a misdemeanor under Section 3616(a)[2] of the Internal Revenue Code of 1939.

Berra v. United States (April 30, 1956) ..... U.S. ....., ... S.Ct. ....., 56-1 U.S.T.C. Par. 9480.

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[2]Section 3616(a) reads as follows:

"Whenever any person—

"(a) *False Returns.* Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or state-

Berra is clearly distinguishable from this case, since there the Court held that Section 3616(a) covered exactly the same ground as Section 145(b), the two sections presenting the same factual issues for the jury's determination. The Court held that it was not for the jury to decide whether to apply one section rather than the other, but only to decide the issues of fact. The Court stated, however:

> "In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense."
>
> ..... U.S. at p. ....., ... S.Ct. at p. ....., 56-1 U.S.T.C. Par. 9480 at p. 55,267.

The precise question presented in this case was presented in *Dillon v. United States* (CA 8, 1955) 218 F.2d 97, cert. granted 349 U.S. 914, 75 S.Ct. 603, cert. dismissed December 5, 1955, ... U.S. ....., 76 S.Ct. 191. There a defendant indicted under Section 145(b) had requested an instruction, which was refused, that the jury might find him guilty of a misdemeanor under either Section 145(a) or Section 3616(a). *Certiorari* was granted, then later dis-

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ment, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; . . .

* * * * *

". . . he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

missed, due to the death of the appellant. On the same day *certiorari* was dismissed in *Dillon, certiorari* was granted in *Berra.*

It may be noted that of the several misdemeanors proscribed by Section 145(a), only one, a wilful failure to pay tax, is necessarily included in the felony under Section 145(b). The felony may be, and frequently is, committed without the defendant being guilty of wilful failure to make a return, keep records, or supply information. But the felony cannot be committed without a wilful failure to pay tax.

2. Appellant's rights were substantially prejudiced by the Court's refusal to give the instruction requested.

Under Rule 31(c), the jury could have found appellant guilty of a wilful failure to pay his tax, in violation of Section 145(a), since that offense is necessarily included in the felony with which he was charged. Evidence which would support a conviction of the felony would necessarily support a conviction of the misdemeanor. But the jury could not know this unless it was so instructed by the trial udge. It was not so instructed, but was told only that it might find appellant guilty or not guilty of the felony with which he was charged (R. 93, 97, 99).

Had the jury known that it had a third alternative, *viz.,* to find appellant guilty of a misdemeanor under Section 145(a), it might have returned such a verdict. In that case, the maximum term of imprisonment to which appellant could have been sentenced would have been one year, whereas the sentence im-

posed included imprisonment for a period of five years.

Appellant's rights were thus substantially prejudiced by the Court's refusal to give the instruction requested on lesser included offense.

D. THE GOVERNMENT IS NOT ENTITLED TO RECOVER FROM APPELLANT THE COST OF A DAILY COPY OF THE COURT REPORTER'S TRANSCRIPT.

Costs which were taxed against appellant included the sum of $434.40 which was paid to the court reporter for a daily copy of his transcript ordered by the Government for its use during the trial (R. 10). Appellant's objection to this item (R. 12) was overruled by the trial court, which held that the transcript "was necessarily obtained by counsel for plaintiff for use in the trial of the case." (R. 14).

Title 28 U.S.C.A., Section 1920(2), provides:

> "A judge or clerk of any court of the United States may tax as costs the following:
> * * * * * * *
> "(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case."

The rule as to the imposition of costs is the same in criminal cases as in civil.

Bozel v. United States (CCA 6, 1943) 139 F.2d 153.

That rule is that the cost of a copy of the transcript purchased for the exclusive use and convenience of

plaintiff is not taxable, although the cost of a copy used by the court is allowable.

Cooke v. Universal Pictures (S.D.N.Y., 1955) 135 F.Supp. 480;

Vort v. McGrath (D.C., 1951) 108 F.Supp. 263.

See, also:

Kenyon v. Automatic Instrument Co. (W.D. Mich., 1950) 10 F.R.D. 248, 254.

In *Kenyon* the Court stated:

"The general practice in this and other Federal courts is that the losing party bear the expense of the original transcript which is furnished for the use of the court. . . . The expense of any additional copies of the transcript obtained by the parties for their own personal use must, of course, be borne by them."

Ibid., at p. 254.

This was also the rule prior to the enactment of Title 28 U.S.C.A. Section 1920(2) in 1948.

Atwood v. Jaques (C.C.W.D.Mo., 1894) 63 Fed. 561 (disallowing the cost of copies of transcript ordered by respondent for his use and the use of his counsel);

Donata v. Parker Pen Co. (S.D.N.Y., 1945) 7 F.R.D. 148, 149 (allowing the cost of an original transcript ordered by the Court for its own use);

Stallo v. Wagner (CCA 2, 1917) 245 Fed. 636, 641 (disallowing, under Equity Rule 50, the cost of a copy of a transcript obtained by the opposing party for his own use).

In one case, where the cost of a transcript was allowed, it is not clear from the opinion whether the transcript was ordered by the Court or by counsel:

Sulzbacher v. Travelers Ins. Co. (M.D.Pa., 1942) 2 F.R.D. 490, 491.

In at least three other cases where the cost of a transcript was allowed, the trial judge had found it necessary to use the transcript:

Perlman v. Feldman (D.Conn., 1953) 116 F. Supp. 102, 109, reversed on other grounds (CA 2, 1955) 219 F.2d 173, cert. den. (1955) 349 U.S. 952, 75 S.Ct. 880;

Consolidated Fisheries Co. v. Fairbanks, Morse & Co. (E.D.Pa., 1952) 106 F.Supp. 714;

Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp. (W.D.Mo., 1951) 11 F.R.D. 259, 266.

These cases are therefore distinguishable from the present case, where the Court specifically found that "the stenographic transcript was necessarily obtained by counsel for plaintiff for use in the trial of the case," (R. 14), and there is no indication that it was ever seen by the judge.

In one case, the extra cost of a daily transcript was not allowed, although the cost of a nondaily transcript was allowed.

Stein v. Rosenthal (S.D.Calif., 1952) 103 F. Supp. 227, 232.

Appellant has found not one reported decision allowing the cost of a daily copy of a reporter's tran-

script where it is clear that it was ordered and used exclusively by a party and his counsel. On the contrary, it is clear that under those circumstances the well established practice is to require the party ordering the transcript to bear the expense thereof.

CONCLUSION.

The judgment of conviction entered below should be reversed. If that judgment is affirmed, the order allowing the cost of the daily transcript ordered by plaintiff should be reversed.

Dated, Oakland, California,
May 18, 1956.

Respectfully submitted,
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